No. 81-34

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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DORNIER GMBH, a German corporation, *Petitioner,*

v.

DONALD E. ELLIOTT and EVELYN L. ELLIOTT, individually and as Personal Representative of the Estate of SCOTT V. ELLIOTT, Deceased, BUSH AIR, INC., an Alaska corporation, and WIEN AIR ALASKA, INC., an Alaska corporation, *Respondents.*

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DORNIER, A. G., and DORNIER, GMBH, *Petitioners,*

v.

AVONNA L. SWEANEY, Personal Representative of the Estate of GARY B. ROBERTS, BUTLER AVIATION COMPANY, HOME OIL COMPANY, FIELD AVIATION COMPANY, LIMITED, CLIFFORD L. SHORT, RAY E. FERGUSON, FRANK P. FERGUSON, DON FERGUSON, JOE FERGUSON, DON'S SAFARI FLYING SERVICE, KOTZEBUE FLYING SERVICE, INC., ALASKA CENTRAL AIRWAYS, INC., GEORGE GRANT, and AIRPARTS, INC., *Respondents.*

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA**

## ARGUMENT

### I. The State of Alaska Has Ignored The Requirement That Dornier Have Sufficient Minimum Contacts With The State Of Alaska Before Jurisdiction May Be Asserted.

The briefs filed by respondents make a number of broad factual allegations,[1] but ignore the irrelevance of these alleged facts with regard to the claimed jurisdiction. Among the allegations presented is one which characterizes Dornier as a large manufacturer which produces several modes of aircraft. There is no denial that Dornier has manufactured various models of aircraft in Germany for some time, but that fact does not constitute a contact with the state of Alaska nor does it demonstrate that Dornier's marketing efforts included Alaska within its ambit.[2]

The essential distinction that must be made between the position that has been advanced by respondents, and that which is reflected in the decisions of this court, as well as the Supreme Court of the State of Alaska, is that use of a product within a state is not sufficient for jurisdiction where that use is not the consequence of marketing efforts of the defendant.[3] It

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[1] They also set forth several procedural challenges as well. In response, the docketing fee has been paid and has no impact on the date of filing. As discussion in section II, the Alaska Supreme Court decision is, in all practicality, final, and the petition is therefore appropriately directed to it. Finally, a list of parent, affiliate, and subsidiary corporations has been requested from Germany and will be filed upon receipt.

[2] Respondents contend that Dornier "actively assisted marketing efforts in the United States," but stop short of suggesting that a single SkyServant has ever been sold in the United States. Indeed, the phrasing of respondents' statement suggests their acceptance of the fact that Dornier has not itself marketed its product in the United States, and that the presence of Skyservant aircraft in Alaska is the fortuitous consequence of random resale activities.

[3] Dornier is not seeking a factual redetermination, but rather challenges that standard used by the Alaska courts in finding jurisdiction. The appropriate standard, ignored in the decisions below, requires

remains uncontested by any of the respondents that Dornier has never sold this product within the State of Alaska, or within the United States.

It cannot be contended that Dornier placed the aircraft into the stream of commerce in such a manner that the aircraft would be sold within the State of Alaska, or within the United States. This conclusion is apparent from the fact that Dornier has never shipped this aircraft to any part of the United States for sale to any customer. Neither did Dornier ship a single one of these products to any distributor who sold that product to anyone within the United States. The presence of these aircraft in the United States is not the consequence of Dornier's marketing of its product, but is the consequence of random resale activities of parties not associated with the petitioner Dornier.

Respondents contend that Dornier is subject to jurisdiction in the State of Alaska by virtue of direct contacts with the State of Alaska. It has been recognized that a nonresident cannot be held to general jurisdiction within a forum unless he has substantial contacts with that forum. *Amba Marketing Systems, Inc.* v. *Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977). Where the contacts with the state are not sufficient to subject it to general jurisdiction within that state, then *the claim asserted must be one which arises out of,* or results from, *the defendant's activities within the forum. Ibid.* Even if one were to assume that the contacts alleged of Dornier by respondents were accurate, those contacts would consist of items such as the sale of replacement parts to other Alaskan entities which were consummated in Germany,[4] the distribution of technical

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that forseeability of injury resulting from a product be considered in connection with marketing by the defendant. Where the defendant sells no product destined for a particular forum, or designated for resale in the forum, it simply cannot be charged with the required level of forseeability.

[4] Respondent's contention that the location where title passes is irrelevant is inconsistent with decisions which permit a manufacturer

information to owners of Skyservant aircraft, advertisements which failed to result in the sale of single aircraft in the United States, knowledge by Dornier of the presence of certain Skyservant aircraft within the State of Alaska, etc. It has not, and cannot, be claimed that the injuries alleged were a consequence of a single one of these alleged contacts with the State of Alaska.

While the respondents have suggested, as above, that Dornier is subject to jurisdiction in Alaska by virtue of its direct contacts, their primary argument, and the one relied upon by the courts of the State of Alaska, rests upon the stream of commerce theory of jurisdiction. This court discussed that theory as permitting a forum to assert jurisdiction over a foreign corporation where that corporation "delivers its product into the stream of commerce with the expectation that they will be purchased by customers in the forum state." *World-Wide Volkswagen* v. *Woodsen*, 444 U.S. 286 (1980), 100 S.Ct. 559, 567 (1980). Respondents apparently contend that it makes no difference whether the product reaches a particular user through the sale by the manufacturer's distributors, or whether it be the second, third, tenth, hundredth, or thousandth resale of that particular product. That proposition has been specifically rejected by this court, when it stated that, "The mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." *Id.* at 567.

Even if one were to accept respondents' premise that Dornier's marketing activities included efforts to sell its product in Alaska, it is clearly established that those efforts were unsuccessful. Without the sale of a single Skyservant aircraft in Alaska, it is impossible to reasonably suggest that Dornier could forsee, through its marketing efforts, that Skyservant aircraft would be used in Alaska. Determinations as to

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to direct its marketing activities in such a fashion as to avoid significant contacts with a particular forum, and thereby be free of jurisdiction within that forum.

whether Dornier contacted the FAA for the purpose of qualifying its aircraft for use in the United States, whether its advertising was carried in publications that were distributed in the United States, whether it supplied technical information to owners of Skyservant aircraft wherever they may be, indeed, even whether or not Dornier had distributors within the United States, all become irrelevant if the alleged marketing efforts failed to lead to the sale of a single product within the forum. For when a manufacturer knows that it has not sold a single product within the forum, and where it is making no efforts to sell that product within the forum, it is simply not forseeable to it that its marketing of the product will result in sales within that forum.

No aircraft has ever reached the State of Alaska through Dornier's marketing efforts. Dornier has never sold an aircraft to a distributor for resale to a customer within Alaska. Dornier has no direct contact with the State of Alaska, nor does it have indirect contacts which would make it forseeable that any of its aircraft would be marketed in the State of Alaska. Subjection of Dornier to personal jurisdiction in the State of Alaska would be an abandonment of all limitation on personal jurisdiction over foreign manufacturers, and would be inconsistent with the Constitution of the United States and the decisions of this court.

**II. The Courts Of The State Of Alaska Have, In Violation Of The Constitutional Limitations On Personal Jurisdiction, Determined That Dornier Can Be Subjected To Trial In Alaska, By A Decision From Which Dornier Has No Effective State Remedies.**

Respondents have argued, and it cannot be denied, that further review by the Supreme Court of Alaska would be possible, if necessary, following trial on the merits. Dornier's contention, however, is that courts of the State of Alaska have no right to subject it to *trial* in Alaska, and insofar as the determination of whether proceedings in Alaska will continue, the matter has been finally decided by the highest court in the state.

The existence of exceptions to the rule of finality is well known, and some discussion of exceptions to the finality rule was presented in the briefs of respondents. It is clear that the court has adopted a pragmatic approach to considering questions of finality, and has found finality to exist despite the continuation of proceedings in the lower courts in a number of situations. Dornier submits that just such a situation is presented by its petition for certiorari, and that the courts of Alaska have determined with finality that proceedings will continue before the courts of that state.

In *Mercantile Nat'l Bank at Dallas* v. *C. H. Langdeau Republic Nat'l Bank of Dallas,* 371 U.S. 557 (1963), this court permitted appeal in order to determine a venue question in advance of trial on the merits. It was stated, at 558:

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, *we believe that it serves the policy underlying the requirement of finality in 28 U.S.C.* § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, *to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed* until the conclusion of the proceedings. [Emphasis Added.]

The same concern for unnecessary litigation was voiced by Dornier in its original petition.

This is a matter where Dornier is contesting the right of the courts of Alaska to subject it to jurisdiction, and is separate and apart from the question of whether Dornier may or may not be liable on the merits. This court has recognized that where there is a final decision as to whether or not a matter will proceed before a court, and where the petitioner seeks certiorari on the question of validity of continuing proceedings, jurisdiction is proper under 28 U.S.C. § 1257. *Harris* v. *Washington,* 404 U.S. 55 (1971). In *Harris,* the State of Washington attempted to try the petitioner on charges of murdering Mark Allen Harris and assaulting Laila Violet Harris after he had been acquitted of the murder of Ralph Burdick, despite

the fact that all of the claims related to a single bomb explosion. Petitioner sought certiorari after the State of Washington had decided that a second trial was permissible, and this court considered that decision final and granted certiorari despite the fact that the second trial could have resulted in the acquittal of the petitioner.

In *American Motorist Ins. Co.* v. *Starnes*, 425 U.S. 661 (1976), the peititioner challenged a ruling of the Court of Civil Appeals of Texas relating to a venue statute, and sought certiorari from the United States Supreme Court after the denial of its application for a writ of error by the Supreme Court of Texas. This court concluded that finality existed, stating in footnote 3 on page 642:

> Appellant has invoked this court's jurisdiction under 28 U.S.C. §1257(2), which requires that the judgment for which review here is sought be final. For the reasons stated in *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558, 83 S.Ct. 520, 522, 9 L.Ed.2d 523, 526 (1963), the judgment presently before the court is final for purposes of section 1257(2).

The question presented in *Starnes* is remarkably similar to the one presented here. In both, the question related to whether the court in which the litigation was proceeding had a right to conduct that litigation, and in both an adverse decision had been rendered by the trial court. In both situations, the petitioner first sought review by the respective state supreme court, and in both situations, the state supreme court declined to provide that review. Just as this court found that finality existed with regard to Starnes, this court should find that finality exists with regard to the decisions from which Dornier seeks certiorari.

Dornier is presently confronted with the unenviable position of either complying with an erroneous series of orders by courts of the State of Alaska, which will effectively circumvent the constitutional impediments on the over-zealous assertion of jurisdiction by state courts, or, alternatively, to refuse to comply with the orders relating to jurisdiction in Alaska, and

suffer the consequences of a default judgment. The chilling effect of this impossible decision is manifestly apparent, and permits Dornier to rely upon constitutionally mandated protections only if it will first run the gauntlet of potential sanctions to be levied upon it. To conclude that Dornier can obtain effective relief by appealing any adverse decision on the merits following trial is to subject it to the overwhelming burden and hardship[5] of participation in a trial that is constitutionally prohibited, and to effectively emasculate the constitutional protections that are sought.

Concern for litigants who are placed in untenable positions by virtue of on-going lower court proceedings has been voiced before. In *Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1 (1965), Mr. Justice Goldberg argued, at 3:

> . . . [A] litigant should not be forced to take the risk of a default judgment to obtain the benefits which national policy . . . is designed to afford him.

Though Justice Goldberg refused to grant the stay requested in *Rosenblatt*, the concerns expressed therein are equally applicable in the petition submitted by Dornier.

The courts of the State of Alaska have, in effect, rendered a final decision with respect to the question of whether Dornier can be subjected to trial in Alaska, and Dornier will be deprived of the constitutional protections of due process lest this court grant certiorari as sought by the petitioner. Immediate review is necessary in order to avoid the erosion of the federal policy relating to jurisdictional safeguards as has been enunciated by this court, most recently in *World-Wide Volkswagen* v. *Woodsen, supra.*

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[5] Despite respondent's characterization of Bethel, Alaska, it is small, it is remote, it is predominantly Native, and it is inaccessible by road, even from other communities in Alaska.

## CONCLUSION

Dornier respectfully submits that for all practical purposes the decision of the courts of the State of Alaska are final with respect to the question of whether Dornier can be subjected to jurisdiction in the State of Alaska, and no further meaningful state review is available. The courts of the State of Alaska have violated the petitioners' right to due process of law, and have ignored this court's pronouncements upon the question of jurisdiction. In the absence of a grant of certiorari by this court, defendant Dornier will effectively be deprived of due process, and the federal policies relating to limitations on jurisdiction will be subverted.

Respectfully submitted,

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